Supreme Court, U. S.
FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

No. 77-30

In the Supreme Court of the United States

OCTOBER TERM, 1977

RODNEY F. STICH, PETITIONER

v.

UNITED STATES OF AMERICA
AND FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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Petitioner was formerly employed as an air carrier operations inspector by the Federal Aviation Administration ("FAA"). In April 1967, the Chief of the FAA's National Flight Inspection Division informed petitioner by letter that he was being separated from service effective March 30, 1967, because he had abandoned his position (Exhibit A to record on appeal, pp. 76-77). The letter set forth as grounds for the separation that petitioner had advised his supervisor of his intention to leave the agency by "just walk[ing] off rather than resigning," had submitted a memorandum dated March 30, 1967, in which he stated that he had justification for leaving, and in fact had left (*id.*, at p. 79).

Petitioner appealed from the FAA's decision to the Dallas Regional Office of the Civil Service Commission ("CSC"), which found that petitioner had left his job of his own volition by refusing to report for work and that such refusal amounted to an abandonment of his position. On June 7, 1968, the CSC's Board of Appeals and Review affirmed the decision of the Dallas Regional Office.

Nearly six years later, on May 8, 1974, petitioner filed suit in the United States District Court for the Northern District of California, seeking reinstatement to his position as an air carrier operations inspector with the FAA and back pay to March 30, 1967. Petitioner also alleged numerous acts of misconduct regarding the FAA's air safety operations and sought a judicially supervised investigation of this alleged misconduct. On February 28, 1975, the district court granted the government's motion to dismiss for failure to state a claim upon which relief could be granted. The court of appeals affirmed that decision on April 7, 1977, holding that the district court lacked subject matter jurisdiction over petitioner's claim. The court reasoned that insofar as petitioner was seeking reinstatement and back pay in excess of $10,000, the Court of Claims had exclusive jurisdiction to consider that claim, and that to the extent petitioner was seeking a judicially supervised investigation of FAA conduct, he had failed to present a controversy capable of judicial resolution (Pet. App. 1a).

1. The court of appeals correctly concluded that the district court lacked jurisdiction to consider petitioner's claim for reinstatement and back pay in excess of $10,000. The Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, grants the Court of Claims exclusive jurisdiction to consider a claim for reinstatement and back pay in excess of $10,000. *Mathis* v. *Laird*, 483 F. 2d 943 (C.A. 9); *Polos*

v. *United States*, C.A. 8, Nos. 76-1348 and 76-1483, June 16, 1977; *International Engineering Co.* v. *Richardson*, 512 F. 2d 573 (C.A.D.C.), certiorari denied, 423 U.S. 1048; *Carter* v. *Seamans*, 411 F. 2d 767 (C.A. 5).[1]

Even if the jurisdiction of the Court of Claims were not exclusive, the numerous statutes on which petitioner relies to support district court jurisdiction would not avail him here. This Court has recently held that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, is not an independent source of jurisdiction. *Califano* v. *Sanders*, 430 U.S. 99. Mandamus under 28 U.S.C. 1361 is inappropriate where an alternative remedy, such as the institution of suit in another court, exists. *Ex Parte Baldwin*, 291 U.S. 610, 614. The Civil Rights Act, 17 Stat. 13, as amended, 42 U.S.C. 1985, provides no jurisdiction because, as the court of appeals correctly concluded (Pet. App. 2a); petitioner has not alleged any racial or class-based deprivation against which the Civil Rights Act protects. *Griffin* v. *Breckenridge*, 403 U.S. 88, 102. And no federal question jurisdiction exists under 28 U.S.C. 1331 for a suit against the United States in the absence of a clear waiver of sovereign immunity. *United States* v. *King*, 395 U.S. 1, 4. As Congress has expressly granted jurisdiction for federal employee discharge cases to

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[1]Under a 1972 amendment to the Tucker Act, the Court of Claims has the power to grant both back pay and reinstatement. Thus, 28 U.S.C. (Supp. V) 1491, as amended, provides in pertinent part:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.

the Court of Claims whenever the back pay sought exceeds $10,000, a waiver of sovereign immunity for such suits under 28 U.S.C. 1331 cannot reasonably be found.[2]

2. The district court also correctly dismissed petitioner's request for a judicially supervised investigation of the FAA. As the court of appeals noted, a request for open-ended judicial oversight of an agency's activities fails "to present a 'justiciable controversy,' *i.e.*, an issue in a form 'capable of resolution through the judicial process.' *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)" (Pet. App. 1a).

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[2]Alternatively, petitioner urges that the district court should have transferred the case to the Court of Claims under 28 U.S.C. 1406(c). Petitioner, however, never requested such transfer in the district court. Moreover, a district court need transfer a case to the Court of Claims only if the transfer would be "in the interest of justice." 28 U.S.C. 1406(c). Because petitioner's separation from service was due to his own abandonment of his position, and petitioner delayed almost six years before asserting his claim for back pay and reinstatement, the district court could reasonably conclude that a transfer was not "in the interest of justice." See *Haas* v. *Overholser*, 223 F. 2d 314 (C.A.D.C.).